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**Commission's Approach to Minority
Protection during the Preparation of the
EU's Eastern Enlargement:
Is 2 Better than the Promised 1?**

Dimitry Kochenov



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Abstract

Although minority protection was one of the Copenhagen political criteria and thus was at the core of the conditionality principle presupposing a fair assessment of the candidate countries' progress towards accession on the merits, the Commission simultaneously promoted two contradicting approaches to the issue throughout the whole duration of the pre-accession process. They included, on the one hand, de facto assimilation (prohibited by art. 5(2) of the Framework Convention for the Protection of National Minorities) and, on the other hand, cultural autonomy, bringing to life a complicated web of partly overlapping - partly contradicting standards. This paper is dedicated to outlining the main differences between the two key approaches to minority protection espoused by the Commission in the course of the latest enlargements' preparation.

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Key words

EU Law - Enlargement - Conditionality - Minority protection - Ethnic Minorities - Linguistic Minorities - Baltic States - Pre-Accession - Copenhagen Criteria.

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Commission's Approach to Minority Protection during the Preparation of the EU's Eastern Enlargement: Is 2 Better than the Promised 1?*

Dimitry Kochenov

" ... destined to join the Union on the basis of the same criteria and ... on an equal footing" (Luxembourg European Council, 12-13 December 1997, Presidency Conclusions, Para. 10).

*" ... pourquoi ... la minorité russe devrait-elle avoir un traitement différent de celui d'autres minorités dans d'autres pays candidats?" (Marc Maresceau, "Quelques réflexions sur l'origine et l'application de principes fondamentaux dans la stratégie d'adhésion de l'Union européenne", in *Le droit de l'Union européenne en principes. Liber amicorum en l'honneur de Jean Raux* (Rennes 2006), at 91)*

1. Introduction

The articulation of the pre-accession principle of conditionality in the course of the preparation of the recent Eastern enlargements of the EU¹ provided this organisation with a number of tools of influence necessary to effectively alter the situation in the field of minority protection in the candidate countries and

* Drafts of this paper have been presented at the University Association for Contemporary European Studies (UACES) annual research conference [Exchanging Ideas on Europe 2006: UACES 36th Annual Conference](#) (Limerick, August 2006) and at the annual British Association for Slavonic and East European Studies (BASEES) conference (Cambridge, April 2007). I am grateful to Prof. Fabian Amtenbrink, Prof. Laurence W. Gormley, Prof. Christophe Hillion and Prof. Marc Maresceau who read the previous drafts of the paper at different stages of completion, to Gabriel N. Toggenburg who, besides providing valuable criticism of the draft of the paper, kindly agreed to serve as a discussant at the Limerick conference, and to Eamonn Butler who convened the "EU Eastern Enlargement and Minority Rights" panel at Cambridge. This paper is a slightly reworked section of a larger study to appear in the 31(1) *Boston College International and Comparative Law Review* this autumn (2007) under the title „The summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection“. All the errors remain mine.

¹ The fifth enlargement round accommodated Estonia, Latvia, Lithuania, Poland, Slovakia, the Czech Republic, Hungary, Slovenia, Malta and Cyprus: OJ L236, 2003, entered into force on 1 May 2004. The sixth enlargement round accommodated Romania and Bulgaria: OJ L157, 2005, entered into force on 1 January 2007.

other states willing to accede.² This happened notwithstanding the fact that “respect for and the protection of minorities”³ as such lies outside the scope of the *acquis communautaire*⁴ (the Draft Reform Treaty, when it enters into force will be the first document of this level to make a direct reference to the “rights of persons belonging to minorities”⁵).

How was the pre-accession conditionality applied in this field? Was the Commission really assessing the progress achieved by the candidate countries against the same criteria and strictly on the merits? What was the standard applied by the Commission to measure the candidate countries' compliance? This paper suggests that the rhetoric of non-discriminatory treatment of the candidate countries and the assertions regarding the meritocratic nature of the pre-accession assessment process notwithstanding, the Commission actually applied two largely contradictory standards in the course of the pre-accession process. In practice, the progress achieved by a particular country in the course of the pre-accession exercise was not tied uniquely to its success in dealing with the issues outlined by the EU as problematic, but also depended on which of the two standards the Union chose to apply to the given candidate. Albeit using a particular example of minority protection, this paper fully upholds Hillion's finding that the introduction of the Copenhagen criteria did not actually make enlargements more predictable and clear.⁶ It outlines a number of elements of the Commission's pre-accession assessment of minority protection in the candidate countries which severely undermined the

² On the legal regulation of enlargements see most importantly Andrea Ott and Kristyn Inglis (eds.), *Handbook on European Enlargement* (The Hague, 2002); Christophe Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford, 2004). Also Dimitry Kochenov, “EU Enlargement Law: History and Recent Developments: Treaty - Custom Concubinage?”, 9(6) *European Integration Online Papers* (2005), at <http://eiop.or.at/eiop/texte/2005-006.htm>, with an exhaustive list of books on this issue in footnote 2.

³ Bull. EC 6-1993. For analysis see Tanja Marktler, “The Power of the Copenhagen Criteria”, 2 *Croatian Yearbook of European Law and Policy* (2006), 343-363.; Christophe Hillion, “The Copenhagen Criteria and Their Progeny”, in Christophe Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford, Portland, 2004); Dimitry Kochenov, “Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law”, 8(10) *European Integration Online Papers* (2004), at <http://www.eiop.or.at/eiop/texte/2004-010.htm>.

⁴ *Acquis communautaire* includes the whole body of legal instruments in force in the EU: Christine Delcourt, “The Acquis Communautaire: Has the Concept Had Its Day?”, 38 *Common Market Law Review* (2001), 829-870. The relationship between the Copenhagen criteria and the *acquis communautaire* is not straight-forward: while the *acquis* is broader in scope the criteria acquired a de facto binding character in the pre-accession, entering the *acquis* in their own right. See e.g. Dimitry Kochenov, “Why the Promotion of the Acquis Is Not the Same as the Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy Instead of Just Promoting the Acquis: Some Lessons from the Fifth Enlargement”, 2(2) *Hanse Law Review* (2006), at <http://ssrn.com/abstract=953812>.

⁵ Included in the list of values of the Union in Draft Article 2 EU (the version of the Reform Treaty used is that of 23 July 2007), at <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001.en07.pdf>.

⁶ Christophe Hillion, “Enlargement of the European Union: A Legal Analysis”, in Anthony Arnall and Daniel Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, 2002), 401-418, at 402. For more on this issue (with a particular emphasis on the pre-accession promotion of democracy and the Rule of Law) see Dimitry Kochenov, *EU Enlargement: The Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague, London, New York, forthcoming).

conditionality idea behind the pre-accession process. The main task of this paper is to sketch, without going deep into details, a comprehensive picture of how different the contradictory approaches applied by the Commission were.

Judging by the Reports on the progress of the candidate countries towards accession to the EU (hereinafter "Reports") and Opinions on these countries' applications for the membership of the European Union (hereinafter "Opinions") released by the Commission in the course of the preparation of the Eastern enlargement,⁷ minority protection was at the core of the pre-accession process. Sections of the Copenhagen-related documents⁸ dealing with the assessment of this criterion were considerably longer than the sections dealing with other issues falling within the scope of the first (or political) Copenhagen criterion.⁹ The analysis contained therein covered a large number of minority protection issues. Reports dealing with some countries even adopted a unique sub-structure of the minority protection section, something the Commission did not do while addressing other issues.

Such a serious approach to minority protection can be regarded as a logical response to the rise of nationalism in Central and Eastern European countries and is clearly connected with the EU's stability and security concerns.¹⁰ While it has been argued that "nationalism is an inevitable factor in the creation of

⁷ All Reports and Opinions can be found at http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm.

⁸ For the structure of the whole body of the Copenhagen-related documents - i.e. documents released in implementation of the conditionality principle of the Copenhagen criteria - and their full citations see Kochenov, "Behind the Copenhagen Façade ...", 5-8.

⁹ Such as the functioning of all the branches of power in the candidate countries, the fight against corruption, general human rights issues, and the like.

¹⁰ On the role played in the preparation of the fifth enlargement by the respect for and the protection of minorities Copenhagen criterion see Christophe Hillion, "Enlargement of the EU: The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities", 27(3) *Fordham International Law Journal* (2004), 715-740; Gwendolyn Sasse, "Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?", in Gabriel N. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (Budapest, 2004), 59-84; Antje Wiener and Guido Schweltnus "Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights", 2 *Constitutionalism Web-Papers* (2004), at <http://www.bath.ac.uk/esml/conWEB/Conweb%20papers-filestore/conweb2-2004.pdf>; Jan W. van der Meulen, *Bescherming van minderheden als criterium bij EU-uitbreiding: de Europese Commissie en Midden-Europa* (The Hague, 2003); James Hughes and Gwendolyn Sasse, "Monitoring the Monitors. EU Enlargement Conditionality and Minority Protection in the Central and Eastern European countries", 1 *Journal of Ethnopolitics and Minority Issues in Europe* (2003), at http://www.ecmi.de/jemie/download/Focus1-2003_Hughes_Sasse.pdf; Peter Vermeersch, "EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland", 1 *Journal of Ethnopolitics and Minority Issues in Europe* (2003), at http://www.ecmi.de/jemie/download/Focus1-2003_Vermeersch.pdf; Kristin Henrard, "The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU: Another Aspect of Responsibility/Burden-Sharing?", 9(4) *Maastricht Journal* (2002), 357-391; Gabriel N. Toggenburg, "A Rough Orientation Through a Delicate Relationship: The EU's Endeavours for (its) Minorities", 4(16) *European Integration Online Papers* (2000), at <http://eiop.or.at/eiop/texte/2000-016.htm>.

a post-communist state”,¹¹ not all the scholars share this point of view.¹² In the meanwhile, it is impossible to deny that historically, minority protection has always been especially acute for the Central and Eastern European countries,¹³ particularly so starting with the *interbellum* period, when the dissolution of several empires and the creation of new nation states shifted the borders and gave rise to a number of minority problems all over the region.

The prominent role played by minority protection in the course of the pre-accession process leading to the 2004 and 2007 enlargements did *not* result in (and was not based on) the elaboration of any serious minority protection standard that could be used by the EU both internally and externally, especially during the preparation of the enlargements to come. This paper argues that in addition to the internal-external divide in EU minority protection, consisting in, on the one hand, the lack of minority protection *acquis* and, on the other, EU's empowerment to act as a minority rights promoter *outside* the Union (discussed in detail in the works of Hillion¹⁴ and Wiener and Schweltnus¹⁵) there existed in the pre-accession a duality of minority protection standards applied by the Union, blurring the EU minority protection picture even further. This duality of approaches is the main issue assessed in the paper. As the analysis of the application of the conditionality principle presented hereafter demonstrates, at least two main mutually exclusive standards were employed by the Union in the course of the pre-accession process. The first was roughly building on the idea of toleration of (forced) assimilation (applied to Estonia and Latvia), the second - on the idea of cultural autonomy (applied, *inter alia*, to Romania, Slovakia and Bulgaria). Such a situation, while reflecting well the internal picture in the EU minority protection, which is that of normative disarray, is ill-suited both for the conduct of the future enlargements and, which is probably more important, for the effective protection of the minorities within the EU.

The two main standards *de facto* used by the Commission in the course of the pre-accession assessment of the candidate countries' progress analysed in this paper are not used to make a claim that no deviations existed from the standards outlined. Obviously, given the lack of any single standard, the Commission was quite inconsistent with its minority protection promotion within each of the two groups of countries covered hereafter, meaning that

¹¹ András Sajó, *Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe* (Chicago, 1993), 53.

¹² E.g. Rein Mullerson, "Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection", 56 *Modern Law Review* (1993), 793-811, at 799-803.

¹³ Petra Roter, "Locating the 'Minority Problem' in Europe: A Historical Perspective", 4(3) *Journal of International Relations and Development* (2001), 221-249.

¹⁴ Hillion, "Enlargement of the EU ...", *passim*.

¹⁵ Wiener and Schweltnus, "Contested Norms ...", 29-34.

deviations existed within each of the two main standards discovered here. However, these discrepancies between the deviations in the standards adopted by the Commission within the assessment of the first and the second groups of countries were truly marginal, compared with a fundamental divide separating the two main approaches the paper aims at discussing. Even with multiple nuances within each of the two, only two fundamentally different standards remain. Consequently, and given the fundamental contradictions separating these two standards, they are of special interest for the pre-accession assessment of minority protection promotion in the candidate countries.

The paper starts off providing an overview of the essence of both diverging approaches to minority protection adopted by the Commission in the course of the pre-accession assessment of the candidate countries. Based on the analysis of the Copenhagen-related documents seven main areas are outlined, where the treatment of the countries belonging to one group was substantially or entirely different from the treatment of the countries belonging to another group. The sections that follow provide an overview of these particular areas. In the conclusion an overall analysis of the Commission's approaches to the pre-accession minority protection is weighed against the expectations stemming from the conditionality idea as formulated by the Luxembourg European Council (12 - 13 December 1997).

2. Two approaches to pre-accession assessment of minority protection - a general overview

It is difficult to establish with certainty the exact sizes of minority populations in the countries of Central and Eastern Europe. The statistical data concerning minority population in that region has been called a “great illusion”.¹⁶ While the minority population data can provide a frame of reference, it is clear that it is very far removed from reality. This issue is especially acute in the case of Roma populations¹⁷ and equally concerns all the candidate countries, acceding states and the (new) Member States. It is clear, however, that in the countries that joined the EU in 2004 and 2007 millions of people are discriminated against on the basis of their belonging to a minority group.

Judging both by the substance and by the structure of the Copenhagen-related documents dealing with minority protection in the Central and Eastern European countries, two distinct groups of states can be outlined. The Commission's approach to them appears to be quite different, which substantiates the claim made by Wiener and Schwellnus that “[minority protection] conditionality varies greatly across accession states”.¹⁸ Simply put, the Commission failed to formulate the single pre-accession minority protection standard that was supposed to lie at the core of the pre-accession assessment of the candidate countries, thus severely undermining the idea of assessment of the candidate countries' progress based on the application of the same criteria as underlined by the Luxembourg European Council Presidency Conclusions.

The first group of candidate countries included¹⁹ Bulgaria,²⁰ Romania,²¹ Slovakia,²² Hungary,²³ and the Czech Republic.²⁴ The Copenhagen-related

¹⁶ Andre Liebich, “Ethnic Minorities and Long-Term Implications of EU Enlargement”, 98(49) *European University Institute Working Papers* (1998), 16, at http://www.eui.eu/RSCAS/WP-Texts/98_49t.html.

¹⁷ István Pogány, “Legal, Social and Economic Challenges Facing the Roma of Central and Eastern Europe”, 2 *Queen's Papers on Europeanisation* (2004), at <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/Europe/Files/Fileupload/5183,en.pdf>; Peter Vermeersch, “Ethnic Mobilisation and the Political Conditionality of EU Accession: The Case of the Roma in Slovakia”, 28(1) *Journal of Ethnic and Migration Studies* (2002), 83-101.

¹⁸ Wiener and Schwellnus, “Contested Norms ...”, 15.

¹⁹ On minority protection in the Constitutional Law of the countries of this group see e.g. Wojciech Sadurski, “Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe. Part III: Equality and Minority Rights”, 6 *European University Institute Working Paper Law* (2003), at <http://cadmus.eui.eu/dspace/bitstream/1814/201/1/law03-6.pdf>.

²⁰ E.g. Antonia Zhelyazkova, “The Bulgarian Ethnic Model”, 10 *East European Constitutional Review* (2001), 62-66.

²¹ E.g. István Horvath and Alexandra Scacco, “From the Unitary to the Pluralistic: Fine-Tuning Minority Policy in Romania”, in Anna-Mária Biró and Petra Kovács (eds.), *Diversity in Action. Local Public Management of Multi-Ethnic Communities in Central and Eastern Europe* (Budapest, 2001), 241-272; Melanie Ram, “Minority Relations in Multiethnic Societies: Assessing the EU Factor in Romania”, 1(2) *Romanian Journal of Society and Politics* (2001), 63-90.

documents dealing with minority protection in these countries did not contain any special sub-structure and dealt with a number of minorities, mostly concentrating on the situation of the Roma,²⁵ ethnic Hungarians²⁶ (mostly in Slovakia and Romania) and ethnic Turks (in Bulgaria).²⁷ A number of smaller-size minority groups have also been mentioned (e.g. the Csango in Romania²⁸). While dealing with these countries the Commission advocated wider inclusion for the minority population in all spheres of life, respect and support for minority cultures, introduction of education in minority languages (including higher education for some minority groups) and, in some cases, cultural autonomy. A special emphasis was put on the issue of non-discrimination on the ground of belonging to an ethnic minority.

The second group of countries was considerably smaller and only included Latvia and Estonia. The Copenhagen-related documents dealing with the state of minority protection there adopted a special structure, different from that contained in the Copenhagen-related documents dealing with the first group of countries. The main focus of discussion here was on the situation of the 'Russian-speaking' minority,²⁹ although, just as in the previous group, a

²² E.g. Kyriaki Topidi, "The Limits of EU Conditionality: Minority Rights in Slovakia", 1 *Journal of Ethnopolitics and Minority Issues in Europe* (2003), at http://www.ecmi.de/jemie/download/Focus1-2003_Topidi.pdf.

²³ E.g. Vermeersch, "EU Enlargement ...", 11-15; Andrea Krizsán, "The Hungarian Minority Protection System: A Flexible Approach to the Adjudication of Ethnic Claims", 26(2) *Journal of Ethnic and Migration Studies* (2000), 247-262.

²⁴ E.g. Vermeersch, "EU Enlargement ...", 15-17.

²⁵ On the influence of the transition to democracy on the situation of the Roma minority see e.g. Pogány, "Legal, Social and Economic Challenges ..."; Vermeersch, "Ethnic Mobilisation ..."; Dena Ringold, *Roma and the Transition in Central and Eastern Europe: Trends and Challenges* (Washington D.C., 2000); István Pogány, "Accommodating an Emergent National Identity: The Roma of Central and Eastern Europe", 6 *International Journal of Minority and Group Rights* (1999), 146-167; Marc W. Brown, "The Effect of Free Trade, Privatisation and Democracy of the Human Rights Conditions for Minorities in Eastern Europe: A Case Study of the Gypsies in the Czech Republic and Hungary", 4 *Buffalo Human Rights Law Review* (1998), 275-315.

²⁶ On the overview of the situation of the Hungarian minority: Geri L. Haight, "Unfulfilled Obligations: The Situation of the Ethnic Hungarian Minority in the Slovak Republic", 4(1) *ILSA Journal of International and Comparative Law* (1997), 27-120.

²⁷ E.g. Zhelyazkova, "The Bulgarian Ethnic Model ...", 62-66.

²⁸ In including the mentioning of this particular minority in the Regular Reports the Commission was following the Parliamentary Assembly of the Council of Europe: PACE Recommendation 1521 (2001) Csango minority culture in Romania.

²⁹ See Kyriaki Topidi, "Zashchita men'shinstv i chlenstvo v ES stran Baltii: mify i real'nost'", in Andres Kasecamp and Heiko Pääbo (eds.), *Prodvizhenije demokraticeskikh tzennostej v rasshirajushchejsia Jevrope: Izmeniajushchiasia rol' Baltijskikh gosudarstv ot importërov k èksportëram* (Tartu, 2006), 31-44; Peter van Elsuwege, "'Russian-speaking' Minorities in Estonia and Latvia: Problems of Integration at the Threshold of the EU", 20 *ECMI Working Papers* (2004), at http://www.ecmi.de/download/working_paper_20.pdf; David Smith, "Minority Rights, Multiculturalism and EU Enlargement: The Case of Estonia", 1 *Journal of Ethnopolitics and Minority Issues in Europe* (2003), at http://www.ecmi.de/jemie/download/Focus1-2003_Smith.pdf; Peter van Elsuwege, "State Continuity and Its Consequences: The Case of the Baltic States", 16 *Leiden Journal of International Law* (2003), 377-388; Nida M. Gelazis, "The Effects of EU Conditionality on Citizenship Policies and Protection of National Minorities in the Baltic States", 68 *European University Institute Working Paper* (2000), at <http://cadmus.iue.it/dspace/handle/1814/1708>; Jekaterina Dorodnova, "EU Concerns in Estonia and Latvia: Implications of Enlargement for Russia's Behaviour towards the 'Russian-speaking' Minorities", 40 *European University Institute Working*

number of other minorities was also discussed. In the context of the Estonian and Latvian applications for accession the Commission relied heavily on the findings of the CoE³⁰ and OSCE³¹ and was backing the developments that were drastically different from the demands addressed by the Commission to the candidate countries belonging to the first group.

Not only were international organisations allowed to play a much more important role in the Commission's assessment of the pre-accession progress achieved in the field of minority protection by the countries belonging to the second group; the findings of such organisations were also employed by the Commission in order to back the developments different (at times contrary) from those that the Commission itself was promoting in the first group of countries.

Concerning the role played by the OSCE, it has even been argued that the EU has "delegated to the High Commissioner on National Minorities (HCNM) the task of judging whether [the candidate countries] have 'done enough' in terms of minority rights".³² The references to the OSCE position are contained both in the Europe Agreements with Estonia and Latvia³³ and in the Accession

Paper (2000), at <http://cadmus.iue.it/dspace/handle/1814/1680>; Vadim Poleštšuk and Aleksei Semjonov, *Minorities and Majorities in Estonia: Problems of Integration at the Threshold of the EU* (Tallinn, 1999), 9, at <http://www.lichr.ee/rus/centre/seminari/seminar1999.rtf>; Ruta M. Kalvaitis, "Citizenship and National Identity in the Baltic States", 16 *Boston University International Law Journal* (1998), 231-272; Richard C. Vissek, "Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia", 38 *Harvard International Law Journal* (1997), 315-373; Marc Holzapfel "Note: The Implications of Human Rights Abuses Currently Occurring in the Baltic States against the Ethnic Russian National Minority", 2 *Buffalo Journal of International Law* (Winter 1995-1996), 329-373; Andrea J. Hanneman, "Independence and Group Rights in the Baltics: A Double Minority Problem", 35 *Virginia Journal of International Law* (1995), 485-527; Lowell W. Barrington, "The Domestic and International Consequences of Citizenship in the Soviet Successor States", 47(5) *Europe-Asia Studies* (1995), 731-763.

³⁰ Geoff Gilbert, "Minority Rights under the Council of Europe", in Peter Cumper and Steven Wheatley (eds.), *Minority Rights in the 'New' Europe* (The Hague, 1999), 53-70; Eero J. Aarnio, "Minority Rights in the Council of Europe", in Alan Phillips and Allan Rosas (eds.), *Universal Minority Rights* (Turku, 1995), 123-133.

³¹ Rob Zaagman, *Conflict Prevention in the Baltic States: The OSCE High Commissioner on National Minorities in Estonia, Latvia and Lithuania*, ECMI (Flensburg 1999), at http://www.ecmi.de/download/monograph_1.pdf; Wolfgang Zellner, "On the Effectiveness of the OSCE Minority Regime. Comparative Case Studies on Implementation of the Recommendations of the High Commissioner on National Minorities of the OSCE. A Research Project of IFSH", *Hamburger Beiträge zur Friedensforschung und Sicherheitspolitik* (1999) No. 111, at <http://www.ifsh.de/pdf/publikationen/hb/hb111e.pdf>; Arie Bloed, "The OSCE and the Issue of National Minorities", in Phillips and Rosas, *Universal Minority Rights* ..., 13-122.

³² Will Kymlicka, "Reply and Conclusion", in Will Kymlicka and Magda Opalski (eds.), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford, 2001), 314-345, at 345.

³³ See the Preamble to the Europe Agreement with Estonia: "Considering the commitment to the intensification of political and economic liberties which constitute the basis of this Agreement and to further development of Estonia's new economic and political system which respects - in accordance inter alia with the undertakings made within the context of the ... Organisation for Security and Cooperation in Europe (OSCE) - the Rule of Law and human rights, including the rights of persons belonging to minorities", OJ L68/1998. For a similar wording see the Preamble to the Europe Agreement with Latvia, OJ L26/1998.

Partnerships,³⁴ making the HCNM's recommendations *de facto* enforceable law in the context of enlargement.

The Commission focused on a number of negative developments in the field of minority rights in these countries, but 'ultimately tolerated the established discrimination' against minority groups in Latvia and Estonia. Unfortunately, the Commission mostly concentrated its pre-accession efforts on the instances of discrimination which were in blunt contradiction with the obligations stemming from the Europe Agreements concluded with Latvia and Estonia, "in particular in the fields of free movement of persons, right to establishment, supply of services, capital movements and award of public contracts".³⁵ In other words, the market-oriented nature of the EU prevailed and little criticism was awarded to the policy of assimilation of the minority population coupled with the exclusion of the minorities from many spheres of life resulting in the marginalization of minorities - a reality in the countries of the second group. The policy of the countries in question tolerated by the Commission amounted, as described in detail by Hughes, to the attempts to trigger exclusion and, eventually, emigration of the minority population.³⁶ This approach was on its face contradictory to the spirit of inclusion and tolerance promoted by the Commission in the first group of countries.

Adopting different approaches to minority protection depending on the countries where the assessment was conducted and a particular minority in question is in clear contradiction with the pre-accession principle of conditionality that consisted in the objective assessment of all the candidate countries' progress based on the same criteria for all. Moreover, even within each of the groups outlined the Commission's approach to minority protection differed from country to country. Different degrees of pressure were applied as well as different degrees of scrutiny.³⁷

³⁴ Not mentioning the OSCE findings directly, the Accession Partnerships, however, make a reference to acting 'in line with the principle of proportionality, international standards and the Europe Agreement'. E.g. Annex to Council Decision 2002/88/EC of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Latvia, OJ L44/2002 and Annex to Council Decision 2002/86/EC of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Estonia, OJ L44/2002.

³⁵ 1999 Report on Estonia's Progress towards Accession, 15; 1999 Report on Latvia's Progress towards Accession, 18. All the Copenhagen-related documents are available at the enlargement web-pages of the Commission (archive) at http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/index_en.htm.

³⁶ James Hughes, "'Exit' in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration", 43(4) *Journal of Common Market Studies* (2005), 739-762, at 739. Cf. Abdullakh Mikitajev, "Problemy grazhdanstva russkikh i russkojazychnogo naselenija v Latvii i Estonii", 3 *Rossijskij biulleten' po pravam cheloveka* (1994), 89-92.

³⁷ For the differences in the Commission's analysis of Poland, Hungary and Romania see Wiener and Schwellnus, "Contested Norms ...", 15 *et seq.* On the tools available to the Commission to vary the level of pre-accession pressure see Kochenov, "Why the Promotion ...", 183-190.

The main differences between the Commission's approaches to the assessment of minority protection in the countries belonging to the first and the second group concerned the following issues:

- Structural approach to minority rights assessment;
- Naming the minorities concerned;
- Different approach to the link between belonging to a given minority and the citizenship of a country in question;
- Different approaches to minority education in the two groups of countries;
- Different approaches to non-discrimination in the two groups of countries;
- Different approaches to minority self-government in the two groups of countries;
- Different approaches to the political rights enjoyed by minorities in the two groups of countries.³⁸

This paper proceeds providing a short assessment of all these aspects one by one.

3. The two groups of countries and the structure of the Copenhagen-related documents

While the two-tier organisation of the problematic countries is not really articulated in the structure of the Copenhagen-related documents of general nature, such as Composite and Strategy Papers, the same cannot be said about the structure of the Regular Reports released by the Commission.³⁹

The Composite and Strategy Papers' approach to the issue was quite unsystematic. So the 1998 Paper tackled three main issues related to minority protection: Situation in Latvia and Estonia; The Roma community; Hungarian minority in Romania and Slovakia.⁴⁰ A similar structure of the assessment of the candidate countries' progress can be found in other papers as well. The 1999 Paper noted the progress with the handling of minority protection in Estonia and Slovakia, discussed the need of "striking the right balance between legitimate strengthening of the state language and the protection of minority language rights",⁴¹ the situation with Roma and Hungarian minorities. The 2001 Strategy Paper narrowed the minority protection assessment to two main issues: situation in Latvia and Estonia and the protection of Roma

³⁸ This list is by no means exclusive and is drafted solely with a view to providing an example of how the approaches to minority protection used by the Commission varied. For the summary of a number of differences see Table 1.

³⁹ For the structure of the whole body of the Copenhagen-related documents, i.e. documents released in implementation of the conditionality principle of the Copenhagen criteria, see Kochenov, "Behind the Copenhagen Façade ...", 5-8.

⁴⁰ Commission's 1998 Paper, 4.

⁴¹ Commission's 1999 Paper, 15.

rights.⁴² The 2002 Paper's structure put a dividing line between the issues of 'Roma' protection and 'minority' protection, the latter to including all other minorities.⁴³

Overall, the Composite and Strategy Papers did not provide clear enough guidance through the minority protection particularities, mentioning the most acute problems and developments, demonstrating an approach similar to that adopted by the Commission in the course of the pre-accession assessment of democracy and the rule of law in the candidate countries.⁴⁴

A different picture can be observed upon the study of the Commission's Regular Reports on the candidate countries' progress towards accession to the European Union. So dealing with the second group of countries the Commission applied a specific 'naturalization-oriented' structure of the Reports, including sub-headings dedicated to the issuance of residence permits and granting citizenship to the members of the minority communities. No questions as to why the members of the minority groups were deprived of citizenship in the first place were ever asked.

All the Regular Reports dealing with the second group of countries were structurally different from those dealing with the first group. The structure introduced by the Commission was mainly a three-fold one, including:

1. naturalization procedure;
2. residence permits and special passports for non-citizens;
3. integration of minorities.

Several Regular Reports also contained a sub-chapter on linguistic legislation.⁴⁵ Already from this structure it becomes clear that the accents in the Commission's assessment of minority protection in Latvia and Estonia were shifted considerably, compared to the minority protection in the first group of countries. Predictably, there was a considerable difference in the substantive approach to the minority protection assessment between the countries belonging to the first and to the second group.

Although an argument can be made that the structural and substantive differences to be found in the documents released by the Commission in the course of the pre-accession exercise can be explained by the differences in

⁴² Commission's 2001 Paper, 11.

⁴³ Commission's 2002 Paper, 13 - 14.

⁴⁴ See Kochenov, "EU Enlargement: The Failure ..."; Peter Van Elsuwege, "Prodvizhenije demokratii v sosednikh ES stranakh: Uroki strategii predvaritel'nyh uslovij chlenstva", in Andres Kasekamp and Heiko Pääbo (eds.), *Prodvizhenije demokraticheskikh tzennostej v rasshirajushchejsia Jevrope: Izmeniajushchiasia rol' Baltijskikh gosudarstv ot importërov k èksportëram* (Tartu, 2006), *passim*.

⁴⁵ E.g. 1999 Report on Estonia's Progress towards Accession, 14; Strangely, the Reports on Latvia's Progress towards Accession did not contain such a sub-chapter.

the particular situations of the minorities in question, this paper will demonstrate that this view appears to be misleading. This is due to the fact that the initial assumption of what minority protection means and how it should be achieved differed considerably between the two groups of countries. In other words, trying to explain the differences in the Commission's approach by the concrete situations of particular minorities would require a supposition that the Commission believed that the standard of minority protection to be achieved and the interests of the minorities themselves were totally different in the two groups of countries. Such a supposition is questionable and sits uneasy with the idea of assessing the candidate countries against a single set of criteria. And, indeed, why should one presuppose that one particular minority group would desire worse protection than any other minority group in the region? Consequently, while assessing discrepancies in the minority protection standards espoused by the Commission in the course of the pre-accession assessment exercise it is absolutely necessary to dismiss all the claims that substantive differences in treatment can be justified by the different positions of the minorities themselves. To agree to such an approach threatens to result in severe misrepresentation of reality.

4. Different definitions of 'minority' applied to the two groups of countries

As if following the example of international law, where consensus concerning the definition of a 'minority' is missing, the European Commission ascribed the notion of 'minority'⁴⁶ its own very specific meaning, which differed considerably from the approach to this issue adopted in the scholarly literature on the topic. Moreover, the approaches to the definition of minority adopted by the Commission in the context of the assessment of the first and the second groups of candidate countries also differed considerably.

A definition of a minority is nowhere to be found in the Copenhagen-related documents, theoretically leaving it up to the candidate countries to determine which minority groups the EU demanded them to respect and to protect. Several peculiar features of the Commission's understanding of the term follow directly from the texts of the Commission's Opinions and Regular Reports.

⁴⁶ Generally on the definition of a minority: John R. Valentine, "Toward a Definition of National Minority", 32 *Denver Journal of International Law and Policy* (2004), 445-473; Gaetano Pentassuglia, *Defining 'Minority' in International Law: A Critical Appraisal* (Rovaniemi, 2000); Henrard, "The Impact of the Enlargement Process ...", 367-370; Isabelle Schulte-Tenckhoff and Tatjana Ansbach, "Les minorités en droit international", in Alain Fenet (ed.), *Les droits et les minorités: analyses et textes* (Brussel, 1995), at 17 *et seq.*; Mullerson, "Minorities in Eastern Europe ...", 807.

Firstly, the Commission's notion of minority used in the majority of the Copenhagen-related documents was clearly limited to national minorities, thus excluding a whole range of other minority groups, which could otherwise deserve protection. It is true that the rights of some other minority groups like religious and sexual minorities are addressed by the Commission in the sections of the Copenhagen-related documents dedicated to other groups of rights.⁴⁷ At the same time, it is surprising why the Commission never used the term 'national' or 'ethnic' minorities in the Regular Reports, insisting on a broader term minority which might appear misleading. It is worth recalling here, that Article 27 ICCPR, for example, distinguishes between at least three kinds of minorities: ethnic, linguistic and religious.⁴⁸ The CoE Framework Convention⁴⁹ adopts a slightly different approach, focusing on the 'national minorities' without specifying this term, unknown to other international minority-protection regimes.⁵⁰

Taking quite a specific view of minorities, the Commission did not necessarily act in accordance with the approach to minorities employed by other Community Institutions. The European Parliament, for example, called for laying "particular stress on the rights of minorities (ethnic, linguistic, religious, sexual etc.) at the time of enlargement negotiations".⁵¹

Secondly, there is certainly a bit of confusion in the way the Commission named the minorities whose situation it monitored. It downgraded the importance of some minorities, by defining them differently from other minority groups in similar situation. Talking about a Hungarian minority living in Slovakia and Romania, the Commission used a term 'Hungarian minority', while when discussing the minorities in Estonia and Latvia the term used is 'Russian-speaking minority'. Obviously, the denomination of what kind of minority is dealt with in the Regular Reports is of crucial importance and can have considerable implications on the strategy and practice of minority protection. The term 'Russian-speaking minority' is clearly narrower in meaning (and also might be interpreted to demand a different scope of protection compared to other minority groups assessed by the Commission) than 'Russian minority'. The latter, also including linguistic rights, includes an emphasis on culture and group identification based on common history, values

⁴⁷ See e.g. Dimitry Kochenov, "Democracy and Human Rights - Not for Gay People? EU Eastern Enlargement and Its Impact on the Protection of the Rights of the Sexual Minorities", 13 *Texas Wesleyan Law Review* (2007), 456-495.

⁴⁸ Cf. Valentine, "Toward a Definition ...", 445-473, at 455 *et seq.*

⁴⁹ Council of Europe, Framework Convention for the Protection of National Minorities (FCNM), adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157.

⁵⁰ Gilbert, "Minority Rights under ...", 55.

⁵¹ European Parliament, Resolution on Human Rights in the World in 1997 and 1998 and EU Human Rights Policy, OJ C98/1999, 270, para. 10.

etc., not limited to linguistic factors.⁵² In other words, in the context of the two groups of candidate countries outlined *supra* the Commission started differentiating between minorities in Latvia and Estonia on the one hand and the minorities in other countries on the other hand, already by defining these minorities differently. This differentiation is truly problematic since the scope of rights connected with the idea of a 'linguistic minority' is very different from that connected with the idea of a 'national minority'. From this discrepancy it follows that the Commission was simply assessing two different scopes of minority rights in the two groups of countries in question. Such an approach cannot be justified by the fact that numerous ethnic minority groups in the Baltic States of Latvia and Estonia shared Russian as a common language, since it totally downplays at least two things: firstly, the importance of the native language (be it not Russian) of particular ethnic groups (mostly Belarusians, Ukrainians) residing in Latvia and Estonia and covered by the umbrella definition of 'Russian speaking'; secondly, it disregards the importance of any aspects of protection of minority groups in question not related to Russian language (in many cases not even their mother-tongue).

5. Minorities and citizenship - different approaches in the two groups of countries

The Commission behaved wisely by refusing, on several occasions, to follow blindly the definitions of minority adopted in a given candidate country, trying to look into the substance of the issue of minority protection.⁵³ This issue was particularly acute in the context of the assessment of the second group of countries. Latvia and Estonia were eager to make a connection between minority status and their national citizenship, thus excluding all the non-citizens living (and often born) in their territory from the scope of application of the minority protection criterion. Unlike in the other "states that emerged from the collapse of the Soviet Union [and] chose a 'zero option' for citizenship, by which all permanent residents were granted citizenship without naturalization"⁵⁴ huge portions of the permanent population of the

⁵² On linguistic minority rights: Fernand de Varennes, "The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?", 2 *Columbia Journal of European Law* (1996), 53-70.

⁵³ By doing this the Commission deviated from the generally established practice allowing the states themselves decide on the definition of a 'minority': Gabriel N. Toggenburg, "Minority Protection in a Supranational Context: Limits and Opportunities", in *id.*, *Minority Protection ...*, 1-36, at 9.

⁵⁴ Lowell W. Barrington, "The Making of Citizenship Policy in the Baltic States", 13 *Georgetown Immigration Law Journal* (1999), 159-199, at 166. It is notable that the Treaty on the Principles of the Interstate Relations between the Russian Socialist Federated Soviet Republic (RSFSR, as Russian was then called) and Estonian Republic 1991 was the first step to a similar solution. In Art. 3.1 the Treaty offered the minorities a choice of either Estonian citizenship or a citizenship of the RSFSR. At the same time, Art. 3.3 stipulated an obligation to conclude a special agreement regarding citizenship issues, but such an agreement has never been concluded. The Treaty was ratified by the Supreme Soviet of the Republic of Estonia on 15 January 1991 (Vedomosti Estonskoj Respubliki No.2,

Baltic States of Latvia and Estonia were not granted citizenship rights after the dissolution of the Soviet Union and thus remained stateless.⁵⁵

Dealing with the countries of the second group the Commission did not allow such a narrow reading of the term minority to become the starting point of the pre-accession assessment, pointing out already in the Opinions on the Latvian and Estonian applications for the membership of the EU (released in 1997) that the assessment of minority protection should be made solely based on *de facto* situation “regardless of the nationality held and difference in personal status arising from non-possession of Latvian nationality”.⁵⁶ An almost identical wording can be found in the Opinion regarding Estonia’s application for accession.⁵⁷ Such constructive approach to the definition of the minorities in the context of these two countries’ pre-accession progress resulted in some mild changes in the naturalization policy, adopted in Latvia and Estonia.⁵⁸ The Commission stopped short of capitalizing on the achievements stemming from the inclusive definition of minorities for the purposes of the pre-accession assessment. Consequently, this approach, although beautiful on paper, only brought inadequate results in practice, leaving much to be desired.

Although not resulting in any sweeping changes in the practice of minority protection, the move made by the Commission was legally speaking very significant, since for the first time the naturalization policies of the candidate countries were influenced by the pre-accession pressure of the EU,⁵⁹ which has only limited powers in this domain. In any other context the Member States are free (albeit without discrimination⁶⁰ and with “due regard to Community law”⁶¹) to decide who their citizens (for Community purposes)

1991). Ratified by the Supreme Soviet of the RSFSR on 26 December 1991 (Vedomosti RSFSR No.3, 1992).

⁵⁵ Citizenship was not granted on the grounds that the independence of Latvia and Estonia did not come, legally speaking, as a result of secession from the Soviet Union, in which case the former Union citizens would get a right of option, but was a restoration of statehood suspended by the Soviet occupation right before the Second World War. Generally, on the secession and the right to nationality under International Law see Jeffrey L. Blackman, “State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law”, 19(4) *Michigan Journal of International Law* (1998), 1141-1194;

⁵⁶ Opinion on the Latvian application, 18.

⁵⁷ Opinion on the Estonian application, 18.

⁵⁸ For analysis see Dimitry Kochenov, “Pre-accession, Naturalization, and ‘Due Regard to Community Law’: The EU’s ‘Steering’ of Citizenship Policies in Candidate Countries during the Fifth Enlargement”, 4(2) *Romanian Journal of Political Science* (2004), at <http://ssrn.com/abstract=926851>.

⁵⁹ On the general overview of how the EU influences national citizenship policies see Karolina Rostek and Gareth Davies, “The Impact of European Citizenship on National Citizenship Policies”, 10(5) *European Integration Online Papers* (2006), at <http://eiop.or.at/eiop/texte/2006-005a.htm>.

⁶⁰ ECJ, case C-300/04 *M.G. Eman and O.B. Sevinger v. College van burgemeester en wethouders van Den Haag*, judgement of 12 September 2006, ECR I-8055.

⁶¹ ECJ, case C-390/90 *Micheletti v. Delegación del Gobierno en Cantabria*, judgement of 7 July 1992, ECR I-4239, Para 10.

are.⁶² That is to say, starting with 1997 the Commission adopted a 'realistic' or 'inclusive' approach to the assessment of the minority protection in these candidate countries.⁶³

The Opinions on the Application for Membership released by the Commission on 15 July 1997 enable the assessment of the scope of the problem: according to the Opinions, "around 35% of the population of Estonia consists of minorities, including non-citizens. ... Of that 35% a group of 23% (numbering around 335.000, mainly of Russian origin) are not Estonian citizens".⁶⁴ "In Latvia, minorities, including non-citizens, account for nearly 44% of the population Latvians are a minority in 7 of the country's 8 largest towns. Within that 44%, 28% of the population, i. e. some 685.000 people, do not have Latvian citizenship and a large proportion of that group, consisting of the former citizens of the USSR, have no citizenship at all".⁶⁵ In its assessment of nationality policies, the Commission dealt with the legal status of over a million people, making up a considerable share of the population of the candidate countries belonging to the second group.

The candidate countries themselves considered the persons in possession of foreign or of no nationality as not being part of the minority population. Consequently, according to Latvia and Estonia, the Copenhagen criterion of 'respect for and protection of minorities' was not applicable to the situation of these people and, as a result, could not affect the application to join the EU made by Latvia and Estonia. To illustrate this point a reference can be made, for example, to the definition of a minority adopted by Estonia in the course of ratification of the Council of Europe Framework Convention for the Protection of National Minorities (FCNM), where Estonian government made a declaration that⁶⁶

Estonia understands the term 'national minorities' as follows:
Citizens of Estonia that

(a) reside on the territory of Estonia;

⁶² Declarations on this matter were made by Germany (attached to the EEC Treaty) and by the United Kingdom (first attached to the 1972 Treaty of Accession by the United Kingdom to the European Communities, later, in the light of a new Nationality Act, the UK made a new declaration on the definition of the term 'nationals' on January 28, 1983). See also ECJ, case C-192/99 *R. v. Secretary of State for the Home Department ex parte Kaur*, judgement of 20 February 2001, ECR I-1237, commented by Stephen Hall, "Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now", 28(3) *Legal Issues of European Integration* (2001), 355-360, at 355.

⁶³ The Commission explicitly recognised the importance of the problem as early as in 1994: Communication from the Commission to the Council, "Orientations for a Union Approach towards the Baltic Sea Region", SEC(94)1747final, Brussels, 25 October 1994, 3.

⁶⁴ Opinion on the Estonian application, 18.

⁶⁵ Opinion on the Latvian application, 17.

⁶⁶ Estonia ratified the Convention on 6 January 1997. Such declarations are not something new: Germany and Luxembourg, for example, made similar declarations while signing the Convention.

(b) maintain longstanding, firm and lasting ties with Estonia;

(c) are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics;

(d) are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity.

The Commission dismissed such a citizenship-centered definition as “not relevant”.⁶⁷

The inclusive vision of minorities was only applied by the Commission to Latvia and Estonia. The first group of countries was analyzed based on the assumption that persons belonging to the minorities hold a nationality of the state where they reside. To illustrate a difference between the two approaches to minority definition, consider the Czech definition of minorities, cited by the Commission: the Czech Law on the Rights of National Minorities, defined minorities as “a group of *citizens* of the Czech Republic living on the current territory of the Czech Republic that differentiate themselves from the rest of the citizens and though their ethnic, linguistic and cultural origin create a minority that at the same time wish to be considered a minority”.⁶⁸ Moreover, the Commission actively participated in the drafting of Minority protection legislation in the Czech Republic: a pre-accession advisor participated in the drafting process as part of the twinning program.⁶⁹ Thus the Commission knowingly approved of such a definition. The same definition was applied also by other countries in the region. It has been noted that such an approach is probably not in line with the ECJ case-law,⁷⁰ which grants a possibility to benefit from the minority protection norms adopted by a Member State not only citizens, but also residents⁷¹ and visitors.⁷²

In other words, the Commission asserted its right to apply the Copenhagen minority protection criterion to both citizens and foreigners (or stateless persons) residing in the candidate countries ‘only’ while dealing with Estonia and Latvia. It is notable, that there is no principal consensus in the scholarly literature on the topic concerning the notion of minority or a necessity of a

⁶⁷ Opinion on the Estonian application, 1.

⁶⁸ 2001 Report on the Czech Republic's Progress towards Accession, 25 (emphasis added).

⁶⁹ Mahulena Hofmann, “The 2001 Law on National Minorities of the Czech Republic”, 1 *European Yearbook on Minority Issues* (2001/2), 623-628, at 624.

⁷⁰ Wiener and Schweltnus, “Contested Norms ...”, 33.

⁷¹ ECJ, case 137/84 *Criminal proceedings against Robert Heinrich Maria Mutsch*, judgement of 11 July 1985, ECR 2681.

⁷² ECJ, case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, judgement of 24 november 1998, ECR I-7637.

link between the minority status and citizenship.⁷³ While it is often argued that citizenship is a necessary precondition to be recognized as a minority,⁷⁴ many scholars disagree with it.⁷⁵

Likewise, it is impossible to find a clear solution to this problem in the main international legal instruments. Thiele notes that the Human Rights Committee established by Article 28 ICCPR recognized that “all members of an ethnic, religious or linguistic minority are granted minority rights, no matter whether they possess the citizenship of the state or not”.⁷⁶ The FCNM does not contain any reference to citizenship either, which does not help, since it does not contain any definition of minority, which would prove that citizenship is not among necessary requirements to be treated as a minority. The Permanent Court of International Justice (PCIJ) did not include a citizenship requirement in its minority definition.⁷⁷ The European Charter for Regional and Minority Languages, on the contrary, explicitly contains a citizenship requirement for minorities.⁷⁸ Overall, “the European regional system considers citizenship as a necessary precondition for membership of a legally protected minority”.⁷⁹ Assessed from this standpoint, the Estonian Declaration attaching minority status to the citizenship of Estonia falls well within the general pattern of mainstream legal developments in the field, which makes the position taken by the Commission an almost revolutionary one.

Notwithstanding the innovative nature of the Commission's move towards the inclusive approach to minority definition the new understanding of who should qualify as belonging to minorities in Estonia and Latvia, clearly did not change the approach towards minorities adopted in these particular countries. The 2002 Estonian Report underlined that Estonia gave too narrow definition

⁷³ Carmen Thiele, “The Criterion of Citizenship for Minorities: The Example of Estonia”, 5 *ECMI Working Paper* (1999), 2 *et seq.*, at http://www.ecmi.de/download/working_paper_5.pdf; Gaetano Pentassuglia, *Minorities in International Law* (Strasbourg, 2002).

⁷⁴ Wiener and Schweltnus, “Contested Norms ...”, 8; Thiele, “The Criterion of Citizenship ...”, 2-3; Francesco Capotorti, “Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities”, UN Doc. E/CN.4/Sub.2/384/Rev.1, (1979), (UN Publication Sales No.E.91.XIV.2, 1991), at 96; Jules Deschêne, “Proposal Concerning a Definition of the Term ‘Minority’”, UN Doc. E/CN.4/Sub.2/1985/31, (1985), at 30.

⁷⁵ Thiele, “The Criterion of Citizenship ...”, 3; Christian Tomuschat, “Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights”, in Rudolf Bernhardt *et al.*, *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte, Festschrift für Hermann Mosler* (Berlin, 1983), 949-979, at 960; Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl, 1993), 499.

⁷⁶ Thiele, “The Criterion of Citizenship ...”, 3; Human Rights Committee, para. 5.1 of the General Comment No.23(50) on Article 27, Minority Rights, UN Doc. CCPR/C/21/Rev. 1/Add. 5, 6 April 1994.

⁷⁷ PCIJ Advisory Opinion Regarding Greco-Belgian “Communities” [1930] PCIJ Reports Series B, No.17.

⁷⁸ Art. 1(a)(i) of the European Charter for Regional or Minority Languages.

⁷⁹ Thiele, “The Criterion of Citizenship ...”, 21; Petra Roter, “Managing the ‘Minority Problem’ in the Post-Cold War Europe within the Framework of a Multilayered Regime for the Protection of National Minorities”, 1 *European Yearbook on Minority Issues* (2001/2), 85-130, at 106.

to minorities,⁸⁰ adding, however, that Estonia adopted a more inclusive approach in practice.⁸¹

Recalling the famous statement by Chief Justice Earl Warren in *Perez v. Brownell*, “citizenship is man’s basic right, for it is nothing less than the right to have rights”.⁸² In the context of the ‘Russian-speaking’ minority in Latvia and Estonia the problem of statelessness is aggravated by the fact that by having a stateless status huge portions of the population of these states are *de facto* prevented by virtue of strict ethnocentric policy of the states belonging to the second group, from acquiring the nationality of the Baltic States in question and also of the Citizenship of the EU, which is derivative thereof. Low naturalization rates in the states of the second group (particularly in Latvia) are very telling in this regard,⁸³ inviting speculations about ineffective and discriminatory policy choices made in these countries. To claim certain limited Community rights the members of minority groups, unless they are family members of Community citizens, can only rely on Directive 2003/109/EC.⁸⁴

6. Different approaches to minority education in the two groups of countries

Putting the fight for school desegregation aside⁸⁵ (it is too complicated an issue for a brief note like this, especially in the light of the recent controversial case-law of the ECtHR⁸⁶) the approach taken by the Commission in relation to education of the minorities is also inconsistent: while one minority should have a university, other minorities lose their rights to schooling in their language. In the context of the ‘Russian-speaking’ minorities an accent is made on *de facto* assimilation, while concerning the Hungarian minority the principles applied by the Commission are absolutely different.⁸⁷

⁸⁰ 2002 Report on Estonia’s Progress towards Accession, 31.

⁸¹ *Ibid.*, footnote 8.

⁸² U.S., case *Perez v. Brownell*, 356 U.S. 44 (1958), Warren Chief Justice, Black Justice, Douglas Justice, dissenting.

⁸³ See Hughes, “Exit in Deeply Divided Societies ...” for some statistical data.

⁸⁴ Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L16/44, 2003.

⁸⁵ On school desegregation in the countries of the first group see inter alia John B. Greenberg, “Brown v. Board of Education: An Axe in the Frozen Sea of Racism”, 48 *Saint Louis University Law Journal* (2004), 869-888; Matthew D. Marden, “Return to Europe? The Czech Republic and the EU’s Influence on Its Treatment of Roma”, 37 *Vanderbilt Journal of Transnational Law* (2004), 1181-1422; European Roma Rights Centre, “Croatian Romani Children Sue at the European Court of Human Rights over Racial Segregation in Schools”, (2004) at <http://www.errc.org/cikk.php?cikk=2080>. European Roma Rights Centre, “A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic”, 8 *Country Reports* (1999).

⁸⁶ ECtHR, Appl. No. 57325/00, *D.H. et al. v. The Czech Republic*, judgement of 7 February 2006; for discussion see Claude Cahn, “The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights”, *European Anti-Discrimination Law Review* (2006) No. 4, 13-23 at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/06lawrev4_en.pdf.

⁸⁷ van der Meulen, *Bescherming van minderheden ...*, 7.

The discrepancy is clear already from the way in which PHARE money was spent. To provide an example, unlike in the context of other candidate countries,⁸⁸ in the Baltic states of Latvia and Estonia not a single cent out of several millions euros available for language training was spent on programmes related to minority language. The money was only spent for the promotion of the state languages of these countries.⁸⁹ The Commission did not see any problem with such kind of spending of community moneys.

Concerning the structure of the educational system as such, further discrepancies are apparent. The Commission followed the developments related to the amendment of the Law on Education in Romania in order to create a German-Hungarian University.⁹⁰ Such university was not supposed to become the only institution of higher education in Romania operating in minority languages, since Hungarian is used at a number of departments of state universities in that country.

The developments in Latvia and Estonia reveal that the growing limitations put on the teaching in the minority language are considered to be an organic part of the promotion of the state language.⁹¹ In Estonia Russian schools get funding from the state. However, the Law on Basic and Upper Secondary Schools, as amended, stipulates for 60% of teaching to be done in Estonian language starting with the year 2007,⁹² which is clearly contrary to the Commission's position stated in the Opinion on the Estonian Application for the Membership of the EU. In that document the Commission recommended that education in Russian language "should be maintained without time limit in the future".⁹³ Latvian education law insists that all minority schools choose bi-lingual program.⁹⁴ Minority school teachers not proficient in Latvian are dismissed.⁹⁵ According to the 2000 Report, starting with the year 2004 'all state funded schools will provide education in the state language only',⁹⁶ thus effectively prohibiting education in the native language of 44% of the population. Strikingly, in response to this development the Commission stated that "The Language law is in line with the international obligations of

⁸⁸ Marc Maresceau, "Quelques réflexions sur l'origine et l'application de principes fondamentaux dans la stratégie d'adhésion de l'Union européenne", in Amine Amar, *Le droit de l'Union européenne en principes. Liber amicorum en l'honneur de Jean Raux* (Rennes, 2006), 69-97, at 96 (example of how the PHARE money was used to promote the knowledge of minority languages in Slovakia).

⁸⁹ Maresceau, "Quelques réflexions ...", 92.

⁹⁰ E.g. 1998 Report on Romania's Progress towards Accession, 11. Also all the subsequent Reports on Romania's Progress towards Accession.

⁹¹ For an account on education in the Russian language in Latvia and Estonia: van Elsuwege, "Russian speaking minorities ...", 18-23.

⁹² 2000 Report on Estonia's Progress towards Accession, 19.

⁹³ Opinion on the Estonian Application, 15.

⁹⁴ 1999 Report on Latvia's Progress towards Accession, at 18.

⁹⁵ *Ibid.*

⁹⁶ 2000 Report on Latvia's Progress towards Accession, 22.

Latvia".⁹⁷ The position of the Commission is difficult to explain, as the approval of the Latvian policy of banning Russian language from schools is clearly contrary to the minority protection guidelines adopted by the Commission for the first group of countries, where education in the minority language is supported and safeguarded. Scholars regret that "under the present situation there seem to be no clear grounds to obstruct the implementation of the Latvian Education Law".⁹⁸

While Hungarians in Romania having schooling in Hungarian were supported by the Commission in establishing a university in their own language, the Russian minority schools in the second group of countries are getting closed and the Commission did not make an issue out of it in the course of the pre-accession.

7. Different approaches to non-discrimination on the grounds to belonging to a minority in the two groups of countries

Unlike in the second group of countries, in the first the Commission was very attentive to minority representation in Government and the police as well as to the organisation of the minority self-government. Importantly, minority participation, as promoted by the Commission in the course of the pre-accession process, was supposed to go all the way up the hierarchy of the army and police personnel.⁹⁹

Access to the labour market in general was also monitored with great care, especially regarding the discrimination concerning the Roma minority. Notwithstanding the efforts of the Commission and the countries of the first group *de facto* discrimination was flourishing.¹⁰⁰

A totally different situation arose in the context of the promotion of non-discrimination in the second group of countries. Judging by the Commission's Reports and Opinions it is possible to conclude that the Commission only regarded the 'Russian speaking' minority in Latvia and Estonia as a linguistic minority. Almost all the measures recommended by the Commission in the course of the pre-accession process were related to the teaching of Latvian and Estonian to the minorities. All the Accession Partnerships focused on the same issue and the PHARE funding was used for it. Thus language teaching was regarded as the main tool of integration and of promotion of non-discrimination. The Commission never questioned the assumption made by the two Baltic states in question that having *one* state language is the only

⁹⁷ 2001 Report on Latvia's Progress towards Accession, 25.

⁹⁸ van Elsuwege, "Russian speaking minorities ...", 21.

⁹⁹ 2000 Report on Bulgaria's Progress towards Accession, 22.

¹⁰⁰ E.g. 1999 Report on Hungary's Progress towards Accession, 15.

reasonable policy and that discrimination based on not knowing this language is entirely justified in a situation where huge fractions of the societies in the two countries are native speakers of a minority language very different from the language embraced by the state as 'official'.¹⁰¹ It can be argued that the financial support of such a restrictive policy *de facto* targeting the minorities amounts to illegitimate spending of Community moneys. It is difficult to disagree with Maresceau on this issue. He writes:

*“L'utilisation du programme PHARE en Lettonie et en Estonie pour consolider et stimuler des lois linguistiques très restrictives vis-à-vis des 'non-citoyens' nous paraît être une utilisation inappropriée des moyens financiers communautaires. Il est très difficile, sinon impossible, dans les objectifs PHARE de trouver une base juridique qui puisse justifier ce genre de financement.”*¹⁰²

Such an approach is extremely problematic also because the Commission in its Reports does not draw a line between integration and assimilation and arguably supports the complete assimilation of the Russian minority, which is clearly a state policy in the two Baltic States. Such a policy contradicts the FCNM, Art. 5(2) of which states that

“ ... the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.”

But what is most striking, the Commission on a number of occasions simply refused to acknowledge that there actually were problems related to the treatment of the Russian speaking minority, unreservedly 'taking the side' of the two Baltic States. It is as if the Commission “participates in a national conspiracy of silence, [following some Estonians and Latvians who] simply seem to refuse to acknowledge that the Russian minority may have legitimate complaints”.¹⁰³ All the Reports dealing with Latvian and Estonian preparation for accession state that the 'rights of the 'Russian-speaking' minority with or without Estonian [or Latvian] nationality continue to be observed and safeguarded'.¹⁰⁴ In fact, this standard was set in 1997 by Agenda 2000, which

¹⁰¹ Maresceau, “*Quelques réflexions ...*”, 93.

¹⁰² *Ibid.*, 94.

¹⁰³ Visek, “Creating the Ethnic Electorate ...”, 357.

¹⁰⁴ 1998 Report on Estonia's Progress towards Accession, 11, 1998 Report on Latvia's Progress towards Accession, 13. The same formula can be found in all the Reports on Latvian and Estonian progress towards accession to the Union.

did not find any “evidence that [‘Russian-speaking’] minorities are subject to discrimination”.¹⁰⁵

In other words, according to the Commission, there is basically no minority problem in the two Baltic States and there is no discrimination. Ironically, the Commission returned to the issue of minority discrimination in the subsequent Regular Reports, mostly addressing discrimination arising from the absence of nationality, having a ‘non state language’ as a mother tongue and related to the use of the minority language, social security, education, work and political representation.¹⁰⁶ The far-reaching nature of the institutionalized discrimination on the basis of belonging to a minority in place in Latvia and Estonia received extensive coverage in the academic literature.¹⁰⁷ The findings of the researchers are in overwhelming contradiction with Commission’s claims.

8. Different approaches to the minority self-government and political rights of minorities in the two groups of countries

Another important issue that arose in the course of the preparation of the recent enlargements was related to the adaptation of the political systems of the candidate countries in order to better accommodate the minority needs. The Commission’s demands to change legislation went as high as up to the candidate country’s constitutional level. In Bulgaria, for example, considering the Constitutional prohibition to form political parties around ethnic, religious or racial lines, the Commission found that “it could be desirable to clarify these Constitutional provisions with reference to the restrictions on the establishment of the political parties”.¹⁰⁸

While a number of minorities in the first group of countries received a possibility to form political parties, use their language in communication with the authorities and were granted a share of self government (be it Hungarians in Romania, or Roma in Hungary), the Russian minority in the second group of countries was treated very differently again. The difference in treatment was largely caused by the stateless status of a huge number of individuals among the Russians in Latvia and Estonia.

Generally speaking, it is clear that “the inability of nearly one third of the population to participate in elections is hardly in line with norms established

¹⁰⁵ Agenda 2000 (COM 1997(2000)final), 45.

¹⁰⁶ The irony here is clear: the 1997 Opinions allowed the Commission to come to a conclusion that the candidate countries met the Copenhagen political criteria (including that of ‘respect for and the protection of minorities’) and all the documents that followed undermined all the basic findings of the 1997 Opinions without questioning any of the conclusions reached on the basis of those findings (which ranged from short-sighted to misleading and wrong).

¹⁰⁷ See footnote 28 *supra*.

¹⁰⁸ 2000 Report on Bulgaria’s Progress towards Accession, 22.

by Western democracies".¹⁰⁹ Latvian and Estonian non-citizens cannot vote in national elections and be members of the political parties.¹¹⁰ This has been criticized by the UN Human Rights Committee,¹¹¹ CoE and OSCE, but was not made an issue during the pre-accession monitoring exercise by the Commission.

Even those in possession of the citizenship of the state where they reside face enormous obstacles in case they try to participate in political life. The Commission did little to change the situation. According to Latvian law, candidates running for office, even in possession of Latvian citizenship had to produce a language proficiency certificate. Latvia lost a case in the ECtHR¹¹² and proceedings in front of the UN Human Rights Committee¹¹³ in relation to this requirement. The ECtHR case *Podkolzina v. Latvia* involved a Latvian of Russian descent who was not allowed to run for office although being in possession of a language proficiency certificate of the highest third level on the grounds that she failed a 'linguistic check', administered at her work place by a special officer without prior notification. In 2002 the ECtHR found that Latvia violated the claimant's right to free elections, at the same time recognizing the importance of the legislation in force, which pleased the Commission.¹¹⁴ Indeed, the Court stated that "requiring a candidate for election to the national parliament to have sufficient knowledge of the official language pursues a legitimate aim".¹¹⁵

Soon after the *Podkolzina* case was decided, the Parliament of Latvia has amended the relevant legislation to lift the linguistic proficiency requirements from those standing as candidates at national and local elections, which was welcomed by the Commission.¹¹⁶ Interestingly, the amendment came right before the NATO summit in Reykjavik in May 2002, which was supposed to discuss *inter alia* the Latvian application for membership in the organisation. Such a coincidence made scholars suspect that the law was actually amended 'for the NATO'.¹¹⁷ The Commission, being well aware of the practices of

¹⁰⁹ Hanneman, "Independence and Group Rights ...", 519. Also Alfred Stepan, "Kogda logika demokratii protivorechit logike natsional'nogo gosudarstva", 3 *Rossijskij biulleten' po pravam cheloveka* (1995), 100-109.

¹¹⁰ UN Human Rights Committee Recommended Estonia to allow non-citizens at least to become members of political parties, CCPR/CO/77/EST, para. 17.

¹¹¹ CCPR/CO/79/LVA, para. 18.

¹¹² ECtHR, Appl. No. 46726/99, *Podkolzina v. Latvia*, judgement of 9 April 2002; See also Frank Hoffmeister, "Podkolzina v. Latvia. Appl. No.46726/99. European Court of Human Rights", 97(3) *American Journal of International Law* (2003), 664-669.

¹¹³ Views of the Human Rights Committee under Art. 5, para. 4, of the Optional Protocol to the Covenant Concerning Communication No.884/1999, UN Doc. CCPR/C/72/D/884/1999, 2001.

¹¹⁴ 2002 Report on Latvia's Progress towards Accession, 34.

¹¹⁵ ECtHR, *Podkolzina v. Latvia*, para. 34.

¹¹⁶ 2002 Report on Latvia's Progress towards Accession, 33.

¹¹⁷ If it was not passed expressly for NATO, the proximity of the summit can at least shed light at the 75% majority achieved in Parliament at the ratification of the amendments - a fact, also noted by

arbitrary 'linguistic checks' of the Latvian citizens belonging to a minority willing to run for office did not take any measures at all to make Latvia reconsider its policy.

The majority of Russians in the second group of countries remain largely excluded from political life due to their stateless status. In other words, the citizenship legislation (or the lack thereof)¹¹⁸ was used in those countries with a view to creating ethnic electorates,¹¹⁹ which falls short of democratic principles of inclusion and non-discrimination.

The discrepancies between the Commission's approaches to minority protection in the two groups of countries in the course of the pre-accession do not stop here. Even in the areas where the undesirable differences in these countries' approaches to minority protection could be easily outlined and effectively dealt with, the moves by the Commission to resolve arising problems were timid at least. This can be illustrated by the adherence of the candidate countries to the pre-accession requirement to ratify key international minority protection instruments.

While Estonia at least ratified some international minority protection instruments by the time of accession to the EU, the same cannot be said about Latvia. The Commission has been stressing the importance of ratification of the FCNM by Latvia throughout the whole reporting exercise starting with the Opinion on the Latvian Application for the Membership of the EU.¹²⁰ By the time the last Report structurally based on the Copenhagen criteria was released, the Convention still was *not* ratified. The delays which eventually resulted in non-accession to the Convention by the time of reaching the point of full EU membership did not hamper Latvian prospects to join the EU in any way.¹²¹

9. Analysis of the Commission's approach

From the examples mentioned above (summarized in Table 1 appended to this paper) it is clear that the approach adopted by the Commission *vis-à-vis* minorities in each of the two groups of countries was contrary to uniform. In fact, all the steps of the pre-accession assessment and the application of the principle of conditionality were *de facto* built along two different lines. The choice of a standard to be promoted depended on the country in question

the European Commission (2002 Report on Latvia's Progress towards Accession, 33). See also Hoffmeister, "Podkolzina v. Latvia ...", 668.

¹¹⁸ Latvia did not have a citizenship law for some time, making any naturalisations legally impossible: Il'ja Kudriavtzev "Latvija: cherez skol'ko let budet grazhdanstvo? ", 3 *Rossijskij biulleten' po pravam cheloveka* (1994), 96-99.

¹¹⁹ Visek, "Creating the Ethnic Electorate ...", 354; Stepan, "Kogda logika demokratii ...", 100-109.

¹²⁰ 2002 Report on Latvia's Progress towards Accession, 30.

¹²¹ Latvia only ratified the Convention in May 2005 with far-reaching derogations.

(whether it fell within the first or the second group) and also on the minority in question. The first standard was vaguely built around the approach to minority protection adopted in the CoE documents and was applied in the context of the first group of countries. The second standard, built around the practices of toleration of exclusion and forced assimilation (deemed illegal according to the CoE minority protection documents) was applied to the minorities of the second group of countries.

Such a discrepancy between the two main approaches taken by the Commission is nothing short of a disaster for the application of the conditionality principle in this field, since conditionality is built exactly on the opposite assumption: the candidates have to meet the minimal standard *common* to *all* in order to accede. Moreover, given the similarities between the practices espoused by the second group of countries in the course of the pre-accession process, which nevertheless did not prevent them ending up, initially, in two different prospective waves of enlargement, Estonia being assessed more positively, the Commission's logic of conditionality becomes even further impenetrable with regard to the choice of countries for the opening of negotiations.¹²² It is impossible to find any consistent explanation as to why the negotiations with Estonia have been opened before Latvia. It is difficult to disagree with Maresceau who stated that "the true and complete story of this unexpected choice by the Commission will probably never be fully known".¹²³ The only possible explanation for such a choice is probably a geo-political necessity, which has nothing to do with political conditionality,¹²⁴ the same necessity that can probably explain the existence of *de facto* two pre-accession minority protection standards applied by the Commission during the preparation of the fifth and the sixth enlargements. Some authors link the decision taken by the EU not to include Latvia within the first wave of countries to open accession talks to several events which took place in 1998. These events included a violent dispersion of a demonstration of 'Russian-speaking' pensioners in March, explosion of a bomb in front of the Russian embassy in Riga in April and a march of the SS veterans in the Latvian capital, attended by a number of senior Latvian military officials.¹²⁵ All these events taken together could not produce a convincing success story related to the integration of the Russian minority. Nevertheless, Latvia and Estonia were

¹²² In other words, it appears that conditionality as such has never been applied by the Commission in the field of minority protection in the course of the preparation of the recent enlargements. This is not surprising, since the conduct of the pre-accession exercise was largely similar in all the fields of the Commission's engagement in the course of the pre-accession, and in the fields of the promotion of democracy and the Rule of Law no conditionality was applied either. On the latter two fields see the chapter "Conclusion: Applying Conditionality?" in Kochenov, *EU Enlargement ...*.

¹²³ Marc Maresceau, "The EU Pre-Accession Strategies: a Political and Legal Analysis", in *id.* and Ewan Lannon (eds.), *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis* (Basingstoke, 2001), 3-26, at 18.

¹²⁴ Dorodnova, "EU Concerns in Estonia and Latvia ...", 9.

¹²⁵ Barrington, "The Making of Citizenship Policy ...", 174.

announced by the Commission to have met the Copenhagen political criteria as early as in 1997, when the Commission's Opinions were released.

Returning to the standards story, the Commission's stance in the field of minority rights is particularly ironical, since minority protection was probably the only area of the pre-accession monitoring where certain more or less clear standards were actually available, thanks to the CoE. Compared to other areas, where such standards simply did not exist, and where the Commission was trying to act as a "myth-maker",¹²⁶ behaving as if it had such standards at hand (like in the area of independence of the judiciary, for example¹²⁷), the Commission, instead of applying ready-to-use CoE findings came up with two distinct approaches contradicting each other and sitting uneasily next to the CoE documents. The example of the application of the pre-accession conditionality principle to the requirement of the 'protection of and respect for minorities' can be used as an illustration for a necessity to better cooperate apparent from the relations between the EU and the CoE (particularly in the context of the preparation of the enlargements of the former).¹²⁸

What could the Commission do to change the situation in the sphere of minority protection in the countries of the second group? Legally speaking, the tools available to this Institution provided it with a wide range of options for solving the statelessness crisis in Latvia and Estonia, unifying two contradicting approaches it applied in the course of the preparation of the fifth enlargement. Moreover, as follows from other areas of the pre-accession reform promotion, these tools could be used in a flexible way in order to ensure better compliance without bluntly dictating to the candidate countries the kind of policies they are expected to adopt.¹²⁹

At least three options were available to the Commission:

- a. to challenge discrimination on the grounds of the non-possession of a citizenship status by the residents of Latvia and Estonia;

¹²⁶ Daniel Smilov, "EU Enlargement and the Constitutional Principle of Judicial Independence", paper delivered at the workshop on Implications of Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders, European University Institute, 28-29 November 2003, Florence, at <http://64.233.183.104/search?q=cache:qpKBwmmnlsJ:www.bilibg.org/cdir/bilibg.org/files/OutlineSmilov.doc+Smilov+EU+Enlargement+and+the+constitutional+principle&hl=en&ct=clnk&cd=4&client=firefox-a>.

¹²⁷ *Ibid.*

¹²⁸ Dimitry Kochenov, "An Argument for Closer Cooperation between the EU and the Council of Europe in the Field of EU Enlargement Regulation", 2 *Croatian Yearbook of European Law and Policy* (2006), 311-341, at <http://ssrn.com/abstract=953960>.

¹²⁹ Dimitry Kochenov, "EU Enlargement: Flexible Compliance with the Commission's Pre-Accession Demands and Schnitzke's Ideas on Music", 2 *Beng Gurion Univeristy Centre for the Study of European Politics and Society (BGU-CSEPS) Working Paper* (2005), at <http://ssrn.com/abstract=926854>.

- b. to promote milder conditions for naturalization;
- c. to attack the citizenship policies of Latvia and Estonia directly, which would have resulted in the acquisition of citizenship by the minorities and thus in the elimination of the most severe forms of discrimination.

The Commission had two main tools in order to pursue these developments: the first being the *Micheletti* reference to the importance of a due regard of Community law while granting citizenship.¹³⁰ The second - building on the assumption that “the external pressure can be a powerful force for change”¹³¹ and using the range of tools provided to the Commission by the pre-accession strategy - most notably the effective use of the Accession Partnerships allowing to stop the flow of the pre-accession financial assistance in case of non-compliance,¹³² as well as enabling the Commission to go as far as freezing the accession talks. It is recognized in scholarly literature as well as obvious from the tools available to the Union within the auspices of the pre-accession strategy, that the Union was clearly in a “privileged position to monitor and influence minority situation in Estonia and Latvia”.¹³³

Unlike in the case of the second group of countries, while dealing with the first group the Commission used the third of the approaches outlined above: the constructive critique of the grounds of granting citizenship. The issue was resolved very fast and concerned the citizenship law of the Czech Republic, drafted in order to exclude the possibilities for the Roma to acquire Czech citizenship. The Commission found that such an approach taken by the Czech Republic, (and especially the need to provide evidence of clean criminal record for five years), was inadmissible (and contrary to the succession rule), thus demanding a candidate country to alter a naturalization policy, including *grounds* for naturalization as included in the Czech law No. 40/1993 Sb., something which never happened in the context of reporting of Latvian or Estonian progress towards accession.¹³⁴

¹³⁰ The Commission actually tried to use this tool, albeit in shy manner. Consequently, it brought minimal results. Also Kochenov, “EU Enlargement. The failure ...”.

¹³¹ Rachel Guliemo, “Human Rights in the Accession Process: Roma and Muslims in an Enlarging EU”, in Toggenburg, *Minority Protection ...*, 37-58, at 37.

¹³² Art. 4, Council Regulation 622/98, OJ L85/1, 1998 introducing Accession Partnerships and making the receipt of the pre-accession aid conditional on pre-accession progress. Also Alain Guggenbühl and Margareta Theelen, “The Financial Assistance of the EU to its Eastern and Southern Neighbours: A Comparative Analysis”, in Marc Maresceau and Ewan Lannon (eds.), *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis* (Basingstoke, 2001), 217-256.

¹³³ van Elsuwege, “Russian speaking Minorities ...”, 17; Kochenov, “EU enlargement: The Failure ...”.

¹³⁴ On the denial of citizenship to the ethnic Roma in the Czech Republic and the successful role of the international organisations, including the EU in addressing this issue see Dimitry Kochenov, “EU's Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic”, 3(2) *Journal of Contemporary European Research* (2007), 124-140, at 124, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015928 (with further references).

Strikingly, all the International Organisations and the great majority of scholars working on the minority protection issue in the two Baltic States did not even discuss the legitimacy of the naturalization policy applied by the two countries. An important exception is the position of Ferdinand de Varennes, who is among the few to question the legitimacy of *inter alia* linguistic proficiency requirements in those countries.

*“The exclusive preference given to Latvian and Estonian seems disproportionate and unreasonable as an attempt to rectify past Soviet practices, bearing in mind the number of permanent residents born in Estonia and Latvia but not of Estonian or Latvian ‘ethnic origin’”.*¹³⁵

It is notable that international legal practice knows the application of the principle of non-discrimination to the acquisition of citizenship.¹³⁶ Citing a dissenting opinion of Judge Rodolfo E. Piza in the *Costa-Rican Naturalization* case of the Inter-American Court,¹³⁷ de Varennes makes a convincing argument that “a reasonable and non-discriminatory naturalization policy must reflect, in a balanced way, the population of a state. It cannot operate in disregard of the languages *actually used* in the country”¹³⁸ (emphasis added). Unfortunately, this approach was not supported by the Commission or the CoE. One OSCE official, however, mentioned the desirability of making Russian a second official language in Latvia,¹³⁹ which only resulted in a scandal and did not bring in any constructive discussion. All in all, in its minority protection in the pre-accession the Commission not only missed out any single standard claimed to be there, but also, amazingly, managed totally to disregard any interests of the minorities in the Baltic states of Latvia and Estonia. Upon analyzing the Commission's conduct of the pre-accession monitoring exercise, “il n'est pas du tout évident que l'approche suivie par la Commission envers les minorités des deux pays baltes sera jamais à même de répondre aux réelles aspirations de cette minorité”.¹⁴⁰

10. Conclusion

Having no internal minority protection tradition, the EU nevertheless made minority protection one of the pre-accession criteria to be met by the candidate countries. Claiming to apply a single standard while judging all the applicants the EU stopped short of creating a minority protection standard to

¹³⁵ de Varenne, “Protection ...”, 136 *et seq.*

¹³⁶ General Comment No.18: Non-Discrimination, in Report of the Human Rights Committee, U.N. GAOR, 45 Sess., Supp. No.40, Annex VI, at para. 7, 8, UN Doc. A/45/40 (1990).

¹³⁷ Inter-American Court of Human Rights, Advisory Opinion OC-4/84 Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa-Rica, January 19, 1984, Inter-Am. CtHR. (Ser.A) No.4, 1984.

¹³⁸ de Varennes, “Protection ...”, 135.

¹³⁹ Jorgen Johansson, “OSCE Provokes Language Scandal”, *Baltic Times* (28 March 2002), at 245.

¹⁴⁰ Maresceau, “Quelques réflexions ...”, 93-96.

be exported. Moreover, as the paper has explained, it even failed to apply similar standards of minority protection to all the candidate countries, vaguely adhering to two contradictory standards instead. The first standard, mostly rooted in the CoE documents on the issue and applied in the context of the pre-accession assessment of the majority of the candidate countries was drastically different from the second standard, which was applied in the context of Latvian and Estonian pre-accession progress and is on the verge of being illegal, once the CoE benchmarks are applied to it. Defining minorities differently and adopting different approaches to minority self-governance, political participation, education and other issues the two approaches contradict each other and hardly overlap. Generally, it is possible to state that while in the first group of countries the Commission is clearly 'on the side of the minorities', in the second, the situation changes and the Commission 'takes the side of the candidate countries', turning a blind eye to the "undoubtedly intentional"¹⁴¹ policy of exclusion promoted by Latvia and Estonia.¹⁴²

Such a contradictory vision of minority protection promotion in the candidate countries adopted by the Commission demonstrates quite clearly that no fair assessment of all the candidate countries on the merits based on the same standards (presupposed by the principle) actually existed. Only dividing the candidate countries into two groups allows discovering some standards' backbone behind the "*ad-hocism* and inconsistency".¹⁴³ Still, the fact that there are at least two standards out there certainly plays *against* the Commission, since this is precisely what the principle of conditionality was supposed to avoid. It is regrettable that considerations of political convenience took place of meritocratic assessment of the minority protection in the Member States-to-be. The sustainability of such approach in the future is questionable.

¹⁴¹ Blackman, "State Successions ...", footnote 163.

¹⁴² And also financing the implementation of the policy ultimately hostile to minority language and culture through the PHARE programme, as Maresceau demonstrated: Maresceau, "Quelques réflexions ...", 93-96.

¹⁴³ Sasse, "Minority Rights and EU Enlargement ...", 69.

Table 1: Different approaches to minority protection adopted by the Commission while dealing with the first and the second groups of countries

	1 st group of countries	2 nd group of countries
Minority protection is limited to 'linguistic minorities'	No	Yes
The definition of minority is linked to citizenship	Yes	No
Minorities are entitled to increased opportunities to get schooling in their native language	Yes	No
Discrimination on the grounds of belonging to a minority is acknowledged in all the relevant Copenhagen-related documents	Yes	No
Members of the minority communities are getting better access to civil service and military appointments	Yes	No
Minorities are entitled to a certain form of self-government	Yes	No
Minorities are entitled to active and passive participation in political life	Yes	No

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